Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: August 26, 1997
CASE NO: 96-INA-073

In the Matter of:

TECINA INTERNATIONAL
Employer

On Behalf of:

EDWARD BERROUET
Alien

Appearance: Michael N. Weiss, Esquire
Miami, FL
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On May 3, 1994, Tecina International ("employer") filed an application for labor certification to enable Edward Berrouet ("alien") to fill the position of Systems Analyst at a annual salary of $ 27,300 (AF 64). The job duties are described as follows:

> All duties of a Systems Analyst for management services firm. Will design and program customized application software for company and clients; will install equipment and software; train end users and provide technical support. Will maintain application software; implement and manage all necessary data bases; monitor local area network installed in company. Prepare hardware and software proposals; elaborate and revise administration and operation procedures.

The job requirements are a Bachelor's degree in Computer Information Systems or equivalent, with two years of experience in the job offered (AF 64).

On January 30, 1995, the CO issued the Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO noted that the alien does not possess the required Bachelor's degree in Computer Information Systems. The CO pointed out that the alien completed a three-year program in International Affairs at a Haitian university, and concluded that the alien's license was not equivalent to a B.S. in Computer Information Systems. The CO stated that the employer may rebut this finding by providing evidence which demonstrates that the specified requirements are the actual minimum requirements for the job (AF 49).

In rebuttal, dated March 6, 1995, the employer argued that the alien's combination of experience, education, and specialized training is the equivalent of the required B.S. In support of this contention, the employer submitted two credential evaluations, one performed by Josef Silny & Associates, a private firm, and the other conducted by Dr. Joel D. Stutz, Professor and Chairman of the Department of Computer Information Systems at the University of Miami (AF 18, 41). Each of these evaluations state that the alien has achieved, through education and work experience, the equivalent of a bachelor's degree with a major in Computer Information Systems.

The CO issued the Final Determination on March 9, 1995 denying the labor certification. In the NOF, the CO instructed the employer to prove that the alien's education is the equivalent of a Bachelor's degree in Computer Information Systems. Because the credential evaluations

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

considered the alien's work experience, as well as his education, the CO concluded that the alien received favorable treatment. The CO noted that several U.S. workers were rejected for not having the required degree and the employer did not have their experience and education evaluated to determine if it was the equivalent of the required B.S. (AF 15).

On April 4, 1995, the employer requested administrative review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 1).

Discussion

The issue presented by this appeal is whether the employer specified the minimum job qualifications for the offered position pursuant to § 656.21 (b) (5).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires for an alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). It is well settled that an employer violates § 656.21 (b) (5) if it hired the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has held that under § 656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In this case, the CO disputes the employer's requirement that applicants possess a Bachelor's degree in Computer Information Systems or the equivalent. In concluding that the stated requirement does not represent the employer's actual minimum requirements, the CO noted that the alien only possessed a three-year degree in International Affairs. In rebuttal, the employer offered two credential evaluations which stated that the alien's education and work experience qualified him for the position. In the Final Determination, the CO rejected the credential evaluations because they factored in the alien's work experience, instead of just his education as the NOF instructed. The CO pointed out that U.S. workers were rejected for not possessing the B.S. degree; however, their credentials were not evaluated to determine whether their experience was equivalent to the required B.S. degree. The CO thus concluded that the alien received favorable treatment compared with U.S. applicants.

We agree with the CO, and conclude that the alien received favorable treatment. The

administrative record shows that the local employment agency referred 12 applicants to the employer. Of these 12 applicants, three applicants possess degrees in Computer Science. Applicant Fayer possesses a bachelor's degree in computer science, and has three years of experience as s computer Programmer/Analyst, and four years of experience as a database supervisor (AF 106). Applicant Kapnic possesses a bachelor's degree in computer science, and has 10 years of experience with computer applications (AF 115). We simply cannot accept the employer's proposition that a person with a three-year degree in International Relations is more qualified for a Systems Analyst position than an applicant with a degree in Computer Science, especially when coupled with the work experience that several of these U.S. workers possess. Furthermore, none of the U.S. applicants received the additional benefit of having their credentials evaluated to determine if they possessed the equivalent of the required B.S. degree. Because we find the employer required more stringent qualifications of U.S. workers than it required for the alien, we hold certification properly was denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.